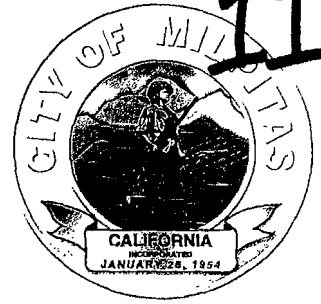


# MEMORANDUM

## Department of Information Services



**To:** Honorable Mayor and City Council  
**Through:** Charles Lawson, City Manager  
**From:** Diana Whitecar, Economic Development Manager  
Bill Marion, Information Services Director  
**Subject:** MetroFi WiFi Proposal  
**Date:** April 7, 2006

### BACKGROUND:

The City has been approached with a second proposal to offer WiFi service within Milpitas. MetroFi Inc., of Mountain View has applied to mount equipment on light poles and traffic signal poles within the public right of way in order to provide wireless Internet service throughout the residential and commercial areas of the City. MetroFi currently operates in the cities of Santa Clara, Cupertino, Sunnyvale, Mountain View and 3 public plazas in San Francisco. According to MetroFi, they currently serve a population of over 150,000 throughout an area covering 32 square miles.

Under the proposed agreement, the City will allow MetroFi to access the public right of way and use City owned streetlight poles and traffic signal poles to mount WiFi transmitters. Depending on the area, between 20 and 30 devices will be installed per square mile. Currently MetroFi is proposing to cover the residential and commercial areas of the City. MetroFi will offer a free advertising supported service to consumers. Additionally, a paid service without advertisements is available at a rate estimated to be in the range of \$20 per month. In exchange for the use of the public right of way, MetroFi will pay a lease amount estimated at between \$10,000 to \$14,000 per year. The total amount will be based on the number of City poles and other facilities actually used by MetroFi. This estimate is based on MetroFi's current planned implementation. MetroFi will be responsible for making arrangements with Pacific Gas and Electric for payment of electricity usage charges.

The City reserves the right to approve or deny the installation of devices in specific areas or on specific streetlight poles such as decorative poles. MetroFi will be required to post a security deposit and meet the City's standard terms for insurance and indemnification. The term of the agreement is for 5 years with 2 additional 5 year renewal terms. An annual adjustment of fees will be made based on the Consumer Price Index.

While the City is involved in the Wireless Silicon Valley Initiative to provide regional WiFi service, staff recommends that the MetroFi proposal be accept at this time. There is potentially benefit to the City and minimal risk. No investment is required by the City and this offering compliments the recently approved agreement with EarthLink. Milpitas residents will be able to choose between various WiFi options that range from a free ad supported service to a paid fully featured service. This proposal was presented to the Telecommunications Commission and the Economic Development Commission, both of which supported this proposal and the concept of multiple service providers.

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**RECOMMENDATION:**

Authorize the City Manger to execute an agreement with MetroFi Inc., to provide WiFi service and for the use of the public right of way, subject to approval as to form by the City Attorney

**FRANCHISE AGREEMENT  
BY AND BETWEEN THE  
CITY OF MILPITAS, CALIFORNIA  
AND  
METROFI, INC.**

This Franchise Agreement ("Agreement") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2006 ("Effective Date"), by and between the City of Milpitas, a California Municipal Corporation ("City"), and MetroFi, Inc., 516 Clyde Ave, Suite 200, Mountain View, CA 94043, a Delaware corporation ("Company"). City and Company may be referred to herein individually as a "Party", collectively as the "Parties" or "City" or "Company."

**RECITALS**

- A. WHEREAS, the City owns, operates, and maintains street light poles, utility poles, and other related equipment and land rights (collectively, "Poles"); and
- B. WHEREAS, City controls the conditions under which third parties are allowed to make physical contact by equipment or other means with City Poles; and
- C. WHEREAS, Company desires to attach its radio, wire, cable, fiber, amplifiers, switching, processing and transmission and distribution components of its broadband telecommunications system ("Communications Equipment") to the City's Poles; and
- D. WHEREAS, pursuant to the Milpitas Municipal Code, any person wishing to use public streets, ways, alleys, property, equipment or places in the City of Milpitas for purposes of providing communication services must obtain a grant of franchise from the City Council; and
- E. WHEREAS, because it is impractical to execute a separate agreement in each instance where Company desires to contact the Poles, it is the intent of the Parties that this Agreement shall be the all inclusive master agreement regarding such contacts for the duration of this Agreement.

**AGREEMENT PROVISIONS**

Now, therefore, for and in consideration of the above referenced recitals and the following mutual covenants, agreements and obligations of the parties, Company and City agree as follows:

**1. SCOPE OF ALLOWED USE OF CITY POLES**

Company shall place its Communications Equipment on the City's Poles and shall perform the work required to install its Communications Equipment promptly and in such manner as to not interfere with the services of any of City's preexisting third party contacts. Use of any Poles under this Agreement shall be confined to Communications

Equipment, for which the City has specifically given Company written permission to install in accordance with this Agreement.

**2. APPLICATION TO PLACE COMMUNICATIONS EQUIPMENT**

Whenever Company desires to place Communications Equipment on any Poles, Company shall make a written Request to the City for permission to attach to specific Poles. The written Request shall include, but not be limited to the following: the location of the specific Poles intended for installation, the description of all Communications equipment to be attached, including serial number or other unique identifier and any drawings, specifications for installation or schematic drawings accompanying the description of such Communications Equipment. City shall have the right to approve or disapprove locations and inspect Company installation of equipment onto City Poles.

**3. COORDINATION WITH THIRD PARTIES**

City shall be responsible for identifying and notifying all third party users of any City Poles of any proposed new contacts or modifications of existing contacts. Company shall coordinate directly with third party users any work that may be required by the third party users to accommodate Company's proposed work. Any costs associated with such modification of third party user's equipment are the sole responsibility of Company.

**4. ACCESS**

For the term of this agreement, Company is authorized to use any easements of City and public rights of way for access to Poles to which Communications Equipment are attached pursuant to this Agreement so long as such use is not in conflict with City's present and future use. The rights granted to access Poles in this Agreement are non-exclusive.

**5. APPROVAL TO PLACE COMMUNICATIONS EQUIPMENT**

5.1. After a written Request has been submitted by Company and has been reviewed and approved by City, permission to place the Communications Equipment on the Poles identified in the Request shall be granted by the City in writing within thirty (30) days after the receipt of a completed Request.

5.2 If, in the judgment of the City, the accommodation of any of Company's Communications Equipment necessitates either the rearrangement of City equipment located on a Pole or the replacement of a Pole, City shall notify Company of the necessary changes and the estimated cost of the work required. At City's option, City may require Company to perform the requested work on behalf of the City to City's specifications. Any services that Company agrees to provide City shall be memorialized in a separate agreement. Alternatively, City may perform the work at Company's sole expense. Company shall reimburse City for the total cost of the work including all direct employee wage and benefit costs,

cost of materials, cost of equipment used, and all other reasonable costs related to the work. City will make reasonable efforts to notify Company of any extraordinary cost before such costs are incurred. Prior to commencing any work, City may require Company to pay a deposit equal to the estimated total cost of the work. City shall not be responsible to Company for any loss sustained by Company by reason of the failure of City or any third party to perform work contemplated by this section.

- 5.3 After completion of any work required by the City to make Poles ready for placement of the Communications Equipment and after receiving written approval to proceed from City, Company shall have the right to install, maintain and use Communications Equipment described in its Request, subject to any reasonable technical conditions in the City's written approval. Before commencing any such installation, Company shall notify City of the time when it proposes to do said work at least five (5) business days in advance so that City may arrange to have its representatives present when such work is performed. Company shall also complete such installation within such reasonable time limit, subject to weather delays, as may be specified in each application and written approval. If the installation is not substantially completed in the specified time limit, the Request and approval shall be considered withdrawn and a new Request must be submitted for approval.
- 5.4 Nothing in this Agreement shall be construed to obligate City to grant Company permission to use any City Poles or parts of Poles.
- 5.5 In areas of the City where decorative street lights or poles are installed, Company may not use these poles for the attachment of Communications Equipment. Should an existing pole that has Company Communications Equipment installed be replaced by a decorative pole, the Company must relocate said equipment to other facilities at the request of the City.

## **6. ADDITIONAL ATTACHMENTS**

Company shall not have the right to place, nor shall it place, any additional Communications Equipment in contact with any Poles without first making Request for and receiving written permission to do so from City as described above. Company may modify or rearrange existing attachments without being charged an additional attachment fee; for any new attachments the applicable fee shall be charged.

## **7. INSTALLATION AND MAINTENANCE OF ATTACHMENTS**

Company shall, at its own risk and expense, install and maintain Communications Equipment on Poles in safe and good repair and in accordance with the requirements of the City and all municipal, state and federal laws, ordinances and regulations.

## **8. IDENTIFICATION OF COMMUNICATIONS EQUIPMENT**

Company shall identify the Communications Equipment newly installed or serviced at each contact point by means of a marking method mutually agreed upon by the Parties. Such identification shall be visible from ground level. Company shall provide the City a 24-hour contact phone number to enable City to report any concerns regarding the Communications Equipment. In the event that City reports such concerns to Company, Company shall promptly respond to such call(s) and perform the required repair or correct any adverse impact to City's operations caused by such Communications Equipment at no cost to City.

**9. RESERVATION OF RIGHTS**

City reserves the right to operate and maintain Poles to fulfill its service requirements to its residents. City shall not be liable to Company for any interruption to Company's service or for any interference with the operation of Company's equipment arising in any manner from the use of Poles by City in accordance with this Agreement, provided that City shall give Company fifteen (15) days advance notice of any non-emergency work which affects Company's Communications Equipment on such poles.

**10. NO CITYSHIP OR VESTED INTEREST CREATED**

No use of any Poles under this Agreement shall create or vest in Company any ownership interest, tenancy, estate or any other interest in the Poles and Company's rights therein shall be and remain a license. Each Party shall pay the cost of the installation and maintenance of its own facilities. Nothing in this Agreement shall be construed to compel City to maintain any Poles for a period longer than demanded by its own service requirements.

**11. DAMAGE TO CITY PROPERTY**

Company shall exercise special precautions to avoid causing damage to Poles and/or any City property. Company shall assume responsibility for any loss from such damage caused by Company. Company shall make an immediate report of the occurrence of any such damage to City and shall, on demand, reimburse City for the total cost incurred in making repairs including all direct employee wage and benefit costs, cost of materials, and cost of equipment used.

**12. USE OF EASEMENTS**

For the term of this Agreement, Company is authorized to use any easements and rights of way of City for access to Poles to which Communications Equipment is attached pursuant to this Agreement so long as such use is not in conflict with City's present and future use, and City is able to authorize or suffer legitimately the same.

**13. REPLACEMENT OF POLES**

13.1 In the event any Poles occupied by Company under this Agreement are to be replaced, repaired or altered, Company shall, at its own risk and expense, upon

notice from City, relocate or replace its Communications Equipment or transfer it to replacement Poles or perform any other work in connection with said equipment that may be required by City.

- 13.2 In cases of emergency, City may, at Company's sole expense, remove, relocate, replace or renew the Communications Equipment, or transfer it to replacement Poles or perform any other work required to serve the needs of City. City shall make commercially reasonable efforts to notify Company of the relocation of its Communications Equipment in the event of an emergency, prior to the relocation of that equipment.

#### 14. **REMOVAL OR VACATION**

Should Company remove its Communications Equipment from any of City's Poles, Company shall, within ten (10) days after such removal, give notice thereof to City, specifying the poles vacated and the location thereof, as well as the date of removal. Removal of all Communications Equipment from any Poles without its replacement or substitution by Company within thirty (30) days shall constitute a termination of Company's right to use such Poles. When removing Communications Equipment from City property, either during or upon termination of this Agreement, Company shall safely and carefully remove all equipment, and return City property to the condition in which City property existed immediately prior to installation of Communications Equipment.

#### 15. **POLE REMOVAL NOTICE**

- 15.1 If City desires at any time to remove any Pole, City shall, except in cases of emergency, give Company notice, in writing, to that effect at least thirty (30) days prior to the date on which it intends to remove such Pole. If Company cannot accommodate the removal of the Communications Equipment within the thirty (30) day notice period then the Parties will either (1) have the City remove and store Company's equipment at Company's sole cost and expense, or (2) shall negotiate and mutually agree upon a longer timeframe for removal of the Pole and Company's equipment, on a case by case basis. The removal of the Communications Equipment shall be at the sole risk and expense of Company.
- 15.2 If City is required by law or ordinance to remove any Pole or group of Poles or for any reason desires that any particular Pole be removed without replacement, City shall so inform Company in writing. If City informs Company of its desire to remove a Pole, then Company shall remove the Communications Equipment from a Pole before City's intended removal date. The removal of the Communications Equipment shall be at the sole risk and expense of Company. City shall have no obligation to provide any alternate Pole or any other facility for the relocation of Company's Communications Equipment.
- 15.3 In the event of an emergency, City may remove such Pole and shall in such case immediately notify Company of the action taken. City shall make commercially

reasonable efforts to notify Company of the removal of its Communications Equipment, prior to the emergency removal of that equipment.

**16. RIGHT TO INSPECT**

City shall have the right to inspect each new installation of Communications Equipment attached to Poles and to make periodic inspections at the City's discretion as conditions may warrant. Such inspections shall not relieve Company of any responsibility, obligation or liability assumed under this Agreement.

**17. COMPENSATION**

As compensation for the right to install and maintain Communications Equipment on Poles, Company shall pay to the City fees calculated as follows:

17.2 Security Deposit. Before Company installs Communications Equipment under this Agreement, Company shall procure and provide City with a pre-paid security deposit in the form of a Certificate of Deposit, letter of credit, or performance bond naming the City as obligee, or such other security as may be acceptable to the City, in the amount of three thousand six hundred dollars (\$3,600.00) for up to 100 Poles. An additional (\$900.00) Security Deposit shall be prepaid for each block of 25 Poles ("Block"). All Security Deposits shall be paid in advance. The Security Deposit shall guarantee and assure the faithful performance of Company's obligations under this Agreement.

17.2.1 City shall have the right to draw against the security in the event of a default by Company or in the event that Company fails to meet and fully perform any of its obligations under this Agreement. Within thirty (30) days of receipt of written notice from the City, Company shall renew or replace such sums of money as shall bring the security deposit or alternative form of security current to the full amount stipulated herein.

17.2.2 In the event Company terminates this agreement or defaults under the terms of Section 22 (Term and Termination), City shall return the Security Deposit within 30 days of removal of all Communications Equipment on condition that all Communications Equipment is removed from said Poles in a safe and non-harmful manner, and all accounts are current.

17.2.3 Pre-Payment of Security Deposit Required. Under this Agreement, Company agrees to pre-pay the Security Deposit prior to attachment of Communications Equipment to any City Poles, and no later than seven (7) days after the effective date of this Agreement.

17.3 Annual Franchise Fees. Company shall pay the City an annual Communication Franchise Fee of Thirty-six Dollars (\$36.00) per Pole. The fee shall be paid annually as set forth in Section 17.5. The fee shall be adjusted each year in accordance with the



Consumer Price Index as set forth in Section 18. The applicable Franchise Fee shall be charged each time a radio attachment or other piece of equipment contacts a Pole.

17.4 Electricity Charges. Company shall be solely responsible for the payment of all electrical utility charges and connection charges to PG&E, the City or any other applicable utility company based upon the Communications Equipment usage of electricity and applicable tariffs. Company agrees to reimburse City for any and all additional electrical utility charges incurred by or charged for any reason to the City by PG&E. City shall sign an Agreement with PG&E in the form attached hereto and incorporated herein by this reference as Exhibit "A" for the delivery of electricity to Communications Equipment in contact with City poles. City cannot and will not guarantee an uninterrupted supply of power, nor will it guarantee the quality of power provided by PG&E. Company shall supply to City and PG&E, in a format suitable to PG&E, a report, list or spreadsheet of every piece of Communications Equipment attached to any City pole. Company shall maintain and update the report monthly, specially indicating in the report new Communications Equipment installations and removals.

17.5 Payment Schedule. As compensation for the right to install and maintain Communications Equipment on Poles, Company shall pay to City fees calculated as set forth in Paragraph 17.3 incorporated herein by reference.

17.5.1 Each such payment shall continue at the level referred to above until adjusted as provided in this Paragraph. The amount of the fee due to City from Company for any year shall be based on the number of Communications Equipment defined in Paragraph 17.8 within 30 days of each anniversary of the Effective Date of this Agreement.

17.5.2 The payment dates provided for in this paragraph may be modified by the City upon written notice to Company. City may render an invoice for amounts due, but failure by the City to render an invoice does not relieve Company from its obligation to pay the fees due.

17.6 Overdue Payments. Any payment not received by the City on or before the due dates specified in Section 17.5.1 shall be considered in default and simple interest on unpaid, undisputed amounts of the payment shall accrue, until paid, at one percent (1%) per month.

17.7 Payment for Renewal Term. At the cessation of the Initial Term, Company may elect to renew this Agreement ("Renewal Term") as set forth in Paragraph 22.1 for that Renewal Term and at the Rate Schedule set forth in Section 17.

17.8 Baseline Report. Initial compensation in this Section 17 shall be based upon the pro-rated number of Communications Equipment estimated to be attached to Poles between the Effective Date of this Agreement and December 31, 2006.

- 17.9 Inventory Report. Thereafter, in addition to the monthly Inventory Reports, an annual Inventory Report shall be submitted by Company to City (under terms of Section 23, Notice), in writing, on or before the first (1<sup>st</sup>) day of January summarizing the total number Communications Equipment including but not limited to setting forth the total number of Pole attachments utilized by Company, new attachments and removals. The Annual Report must coincide with all monthly reports submitted. City shall have the right to audit and verify the Baseline Report and/or Inventory Report to assure the accuracy of the number of Pole attachments stated.
- 17.10 Payment Disputes. If the Company does not agree upon the amount owed, then it shall pay the undisputed amount and shall make a claim as set forth in Section 21 below. Interest at the legal rate shall be awarded on that amount unpaid but actually due.
- 17.11 Penalty. Should City determine that the actual number of Communications Equipment installed exceeds the number in the Inventory Report then Company shall be subject to a \$30.00 fine per Communications Equipment installation in excess of the number stated in the Inventory Reports.
- 17.12 Reimbursement of Expenses. Should the Company require or request the City to provide maps, geographic data, staff assistance or other materials or services, Company agrees to reimburse the City for the cost of providing said materials or services.
- 17.13 Payment of Taxes. Company shall pay all applicable federal, state or local taxes. This Agreement may create a property interest which may be subject to state and/or county property taxation if created, and the party in whom the possessory interest is vested must pay all such property taxes levied on the interest.

## 18. MODIFICATIONS TO PAYMENTS

The Pole Franchise Fee and any new Security Deposit rate per Block of Poles shall be increased annually on each anniversary date of this Agreement, including any option period, based on the percentage of change in the U.S. Department of Labor Bureau of Labor Statistics Consumer Price Index, all items, 1982-1984=100, San Francisco-Oakland-San Jose, Consumer Price Index for all Urban Consumers ("CPI-U") compared to the October CPI-U for October, 1995. The amount of any annual adjustment in such payments shall not exceed five (5%) of the rate in effect in the previous year.

## 19. INSURANCE

Company shall maintain during the life of this Agreement policies of insurance as specified in Exhibit "B" attached and incorporated by reference, and shall provide all certificates and/or endorsements as specified in Exhibit "B."

**20. HOLD HARMLESS/INDEMNIFICATION**

Company agrees to indemnify, defend with counsel approved by City, and hold harmless City, its officers, employees, and agents from any and all claims, demands, actions, causes of action, losses, damages, liabilities, known or unknown, and all costs and expenses, including reasonable attorneys' fees in connection with any injury or damage to persons or property arising out of or in any way connected with the act, omission or negligence of Company, its officers, employees, agents, contractor, subcontractors or any officer, agent or employee thereof in relation to Company's performance under this Agreement.

**21. DISPUTE RESOLUTION**

Any dispute between the Parties which arises during the performance of this Agreement and which the Parties cannot resolve, shall be subject to the following administrative remedy prior to any litigation occurring between the Parties:

- 21.1 Internal Resolution. Both Parties shall attempt to resolve any controversy claim, problem or dispute arising out of, or related to, this Agreement through good faith consultation in the ordinary course of business. In the event that any problem or dispute is not resolved by the project managers of each Party, either Party may upon written notice to the other request that the matter be referred to senior management officials within each respective organization with express authority to resolve the problem or issue ("Request for Internal Resolution"). A written Request for Internal Resolution shall be given by either Party within thirty (30) calendar days of the Parties' knowledge of the claim. Senior management officials shall meet or confer at least once in good faith, to negotiate a mutually acceptable resolution within ten (10) business days of the Request for Internal Resolution.
- 21.2 Notice. Senior management officials are required to only meet once, but may mutually agree to meet more than once if it appears that further meetings may successfully resolve the issue. If the Parties do not successfully resolve the dispute by Internal Resolution, then the Party finding the Internal Resolution unsatisfactory shall provide written notice to the other Party, demanding mediation ("Request for Mediation"). The Request for Mediation may not be given prior to the first meeting for Internal Resolution, and shall not be given any later than ninety (90) calendar days following the completion of the first Internal Resolution meeting. The Request for Mediation shall be sent certified mail-return receipt requested to the other Party, and shall set forth all of the issues that Party deems outstanding that must be submitted to mediation. The Party in receipt of the Request for Mediation shall respond within twenty (20) business days listing any issues it deems appropriate for submission to the Mediator.
- 21.3 Mediation. Any controversies between City and Company regarding the construction or application of this Agreement, and claims arising out of this Agreement or its breach, except those for which the appropriate remedy should be injunctive relief shall be mediated within sixty (60) calendar days of the date on

the written Request for Mediation, or the soonest date thereafter that the mediator is available.

- 21.4 Mediator. Within twenty (20) calendar days or less of the written Request for Mediation, the Parties shall agree on one mediator. If they cannot agree on one mediator within such twenty-day period each Party shall list the names of three (3) potential mediators and shall supply them to the Party demanding the mediation. The Party demanding the mediation shall merge the names of all the potential mediators into a single list, not indicating which Party submitted the name. On that same date as all names are received by the demanding Party, the Parties shall jointly sign a letter directed to the Presiding Judge of the Superior Court of Santa Clara County, requesting that the Judge appoint a mediator from the enclosed list. If a Judge refuses to appoint a mediator, City's choice of mediator shall prevail. If a Party refuses or fails to submit three (3) names within the three day period to the Party preparing the letter, then the letter shall be sent on the fifth day without input from the Party failing to submit names. The mediation meeting shall not exceed one day (eight (8) hours). The Parties may agree to extend the time allowed for mediation under this Agreement.
- 21.5 Costs. The costs of mediation shall be borne by the Parties equally.
- 21.6 Discovery. If, during any dispute between the Parties, a demand is made by Company for documents under the Public Records Act, the City shall have reciprocal rights to demand documents from Lessee.
- 21.7 Condition Precedent to Filing Suit. Except as provided in Section 31 below, mediation under this section is a condition precedent to a Party filing an action in any court, unless that Party has made demand for mediation and the other Party has failed or refused to engage in mediation. In the event of litigation arising out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees, expert witness costs and costs of suit, regardless of the outcome of the litigation.

## 22. TERM AND TERMINATION

- 22.1. This Agreement shall become effective on the Effective Date and shall continue in effect for five (5) years or until the occurrence of one of the following two events:
- 22.1.1. In the event one Party is in default of this Agreement, the non-defaulting Party may provide notice of termination as set forth in Paragraph 30; or
- 22.1.2 Upon the end of five (5) years from the Effective Date. The Term may be renewed for two (2) additional successive five year periods of time upon 6 months' prior written notice by Company to the City, provided that Company is not in default under this Agreement and, subject to the written consent of City.

- 22.2 Upon receipt of a notice of termination, this Agreement shall terminate at the date specified in such notice, which date shall not be less than one (1) year from the date of such notice, unless termination is the result of default in accordance with Paragraph 30. Company, at its own expense, shall remove the Communications Equipment from the Poles within one hundred and eighty (180) days of said date of termination.
- 22.3 In the event that Communications Equipment which has been in place and previously used by Company is not utilized by Company for a period of six (6) consecutive months, City may terminate this entire Agreement upon providing Company ninety (90) days prior written notice of City's intent to so terminate this Agreement. Should Company fail to remove the Communications Equipment, or some part thereof, from City's Poles within said ninety (90) days, City may remove any of the Communications Equipment so remaining, and shall be reimbursed for the equipment and labor costs incurred in connection with removing the Communications Equipment within thirty (30) days of returning such Communications Equipment to Company or making such Communications Equipment available to Company for pickup within the City limits.

## 23. NOTICE

All notices given or which may be given pursuant to this Agreement must be in writing and transmitted by United States mail or by private delivery system as follows:

To City at:                      City Clerk  
   455 E. Calaveras Blvd  
   Milpitas, CA 95035

With copies to:                City Manager  
   455 E. Calaveras Blvd  
   Milpitas, CA 95035

To Attaching  
Party at:                        Attn: Contracts Administrator  
   MetroFi, Inc.  
   516 Clyde Ave, Suite 200  
   Mountain View, CA 94043  
   or by facsimile at: (650) 810-8001

Notice may also be provided to such other address as either Party may from time to time designate in writing, or to those in Exhibit C, attached and incorporated by reference. Any facsimile transmission by either Party must be followed by a copy sent by mail.

## 24. ASSIGNMENTS

Company shall not assign this Agreement, or any portion of it, without the prior written permission of City which shall not be unreasonably withheld or delayed, and any such

assignment made without such consent shall be void and shall not operate to relieve Company from any of its obligations or liabilities under this Agreement.

**25. AMENDMENTS**

This Agreement may be amended from time to time upon mutual agreement of the Parties. Any amendment shall be written and subscribed as herein. All agreements with the City of Milpitas shall be subject to approval of the City Council before City shall be bound thereby.

**26. THIRD PARTY MODIFICATIONS**

This Agreement shall be subject to such changes or modifications as may be required or authorized by any non-City affiliate third party regulatory commission in the exercise of its lawful jurisdiction, provided that neither Party is hereby consenting to its contract rights being impaired, and any modification, revision, renewal or extension of this Agreement shall so state.

**27. SERVICE WARRANTY**

Company hereby warrants that it has acquired, and maintains during the term of this Agreement, all necessary authorizations required to provide services set forth in this Agreement within the City. If the nature and character of Company's Communications Equipment changes in the future, Company shall notify City, in writing, at least thirty (30) days in advance of its intent to change the nature of its Communications Equipment. The Parties agree that the terms of this Agreement are based on the nature of equipment attached to the Poles. Company acknowledges that any unauthorized change in the nature of Communications Equipment, beyond the definition of Communications Equipment specified in this Agreement, shall require the renegotiation of the terms and conditions of this Agreement.

**28. RADIO FREQUENCY EMISSION REQUIREMENTS**

Company shall operate its Communications Equipment in such a manner that it shall not produce, at any time, power densities in any inhabited area that exceed the FCC's Maximum Permissible Exposure (MPE) limits for electric and magnetic field strength and power for density for transmitters or any more restrictive standard subsequently adopted or promulgated. Company states that it is in compliance with such FCC regulations at the time of the signing of this Agreement and shall maintain compliance during the performance of this Agreement. Company shall design and operate its equipment to prevent interference with City communications equipment and the equipment of other wireless service providers operating under an agreement with the City.

**29. DEFAULT AND REMOVAL OF COMMUNICATIONS EQUIPMENT**

- 29.1 If Company should default in the performance of any work which it is obligated to do under this Agreement, except the work of removing its Communications Equipment from any Pole within the time allowed for such work, City may elect to do such work at Company's sole expense and Company, on demand, shall reimburse City for the cost incurred in removing Communications Equipment including all direct employee wage and benefit costs, cost of materials, and cost of equipment used.
- 29.2 If Company should default in the removal of its Communications Equipment or property from any of the Poles within the time allowed for such removal, City shall give written notice to Company that City will remove and store the Communications Equipment or property at Company's sole expense in which event Company shall reimburse City on demand for the entire expense thereby incurred. If Company does not claim said equipment within one hundred eighty (180) days, that equipment shall become the sole property of City in which event title to said equipment and property shall vest in City as of one hundred eighty (180) days after the date of such written notice.
- 29.3 Nothing herein contained shall be construed to make the City or other third parties liable for damage to equipment or service of Company.

### 30. **DEFAULT PROCEDURES**

If Company defaults in any of the following particulars:

- 30.1 Fails to pay the fees prescribed in Section 18 hereof with reasonable promptness as the same shall become due; or
- 30.2 Breaches any other term or condition of this Agreement;

then City shall give Company written notice, either by mail or personal service, setting forth the nature of the default and a demand that said default be cured and remedied. If Company fails, neglects or refuses within thirty (30) days after the giving of said notice to cure or remedy the default, or commence and diligently continue such cure, then City, upon notice and without suit or other proceedings, may terminate this Agreement and cancel and annul the rights and privileges granted herein.

### 31. **NONEXCLUSIVE LICENSE**

The license and right to access the Poles granted by this Agreement is non-exclusive. Company shall not interfere with any other license and right of access granted by City to any other third party.

### 32. **WAIVER AND REMEDIES**

Failure of either Party to enforce any provision of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of

any such provision but the same shall nevertheless be and remain in full force and effect. The remedies expressly provided in this Agreement shall be in addition to any other remedies available at law or in equity.

**33. USE SUBJECT TO PRIOR RIGHTS AND OBLIGATIONS**

Nothing in this Agreement shall be construed as affecting any rights or privileges previously conferred by City or any other owner of an interest in or of facilities on the Poles, by contract or otherwise, upon others to use the Poles covered by this Agreement; and City shall have the right to continue and extend such rights or privileges consistent with this Agreement. The privileges herein granted to Company shall at all times be subject to any such existing contracts and arrangements. Any rights and privileges herein conferred are also subject and subordinate to the prior right of City to use all of its easements, rights of way, and property interests and governmental powers in the performance of its duties as a municipal utility and a governmental entity. Company agrees to be subject to any local ordinances, rules or regulations that may be enacted and applied to the operation of the permitted use.

**34. FORCE MAJEURE**

Neither party shall be responsible for any of its obligations under this Agreement prevented or delayed by reasons which are not reasonably foreseeable and not reasonably avoidable, including Acts of God, floods, fires, hurricanes, tornadoes, earthquakes or other unavoidable casualty, acts of public enemy, insurrection, war, riot, sabotage, epidemic, strike or other labor disputes, freight embargoes, shortages or unavailability of materials or supplies due to governmental action, unusually severe weather conditions, concealed and unknown conditions below the surface of the ground differing materially from those ordinarily encountered and generally recognized as inherent in construction work or which are not reflected on current maps or drawings of underground conditions, or wrongful physical obstruction by any Person at any installation site ("Force Majeure Event"). The time within which any obligation must be performed under the terms of this Agreement shall be extended for a reasonable period to be determined jointly by the City and Company where timely performance is prevented due to a Force Majeure Event. Company or the City shall promptly notify the other party of any Force Majeure event described in this Section and, in such notice, shall indicate the anticipated extent of such delay and shall indicate whether, and to what extent, if any, the delayed party anticipates that such event shall affect the timely performance of such party's obligations under this Agreement.

**IN WITNESS WHEREOF**, the Parties acknowledge and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.



**CITY OF MILPITAS, California,**  
a Municipal Corporation

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

Approved as to Content

\_\_\_\_\_  
Director of Information Services

ATTEST:

\_\_\_\_\_  
City Clerk

By: \_\_\_\_\_

City Manager

Date: \_\_\_\_\_

**MetroFi, INC.**

a Delaware Corporation

By: \_\_\_\_\_

Chuck Haas

Date: \_\_\_\_\_

**BY AND BETWEEN THE  
CITY OF MILPITAS, CALIFORNIA  
AND  
METROFI, INC.**

**EXHIBIT A**

**PGE Right of Entry Agreement**



***Pacific Gas and  
Electric Company™***

**Right of Entry Agreement**

Distribution  
Original: Applicant  
Copy: Division

References:  
E-PM#  
Retirement#

[CITY/COUNTY/STATE] of \_\_\_\_\_ (Agency), has elected to enter into this Right of Entry Agreement (Right of Entry) with PACIFIC GAS & ELECTRIC COMPANY (Licensee), a California corporation.

WHEREAS, Agency owns, operates and maintains certain overhead electric streetlight facilities and utility poles located in the geographic areas of its political jurisdiction, including poles, arms, other related equipment (collectively, "Poles");

WHEREAS, Agency has entered into a Pole Contact Agreement with MetroFi, Inc., a Delaware corporation ("MetroFi") relating to the attachment of MetroFi's radio, wire, cable, fiber, amplifiers, switching, processing and distribution components of MetroFi's broadband telecommunications system ("Communications Equipment") to the Agency's Poles or street light arms attached to utility poles;

WHEREAS, Licensee has entered into a Unmetered Service Agreement with MetroFi relating to Licensee's provision of electric service to MetroFi's Communication Equipment;

WHEREAS, Licensee requires access to MetroFi's Communication Equipment for the purpose of inspection, field or bench tests, and in the event of default under the Unmetered Service Agreement between Licensee and MetroFi, to disconnect or remove the Communication Equipment from the Agency's Poles; and

WHEREAS, Licensee is responsible to disconnect electric load under certain conditions, and Licensee seeks to maintain its right with respect to the energy connection to MetroFi's Communication Equipment, while at the same time respecting the Pole Contact Agreement entered into between Agency and MetroFi.

NOW THEREFORE, Agency and Licensee agree to cooperate by entering into this Right of Entry to allow access to the Poles subject to the following terms and conditions:

1. Agency hereby grants to Licensee and Licensee's agents, consultants, and contractors access to the Poles, including ingress and egress to such Poles on any property owned or controlled by Agency, and any easements or rights of way of Agency. Licensee, at its sole risk and expense, shall be entitled to inspect, field or bench test, disconnect (including the right to sever wire(s) leading from the photocell or at other point on Pole to the Communication Equipment) or remove the Communication Equipment, at any time and from time to time during the entire term of this Right of Entry. Licensee shall perform all work in compliance with applicable federal, state, and local laws, rules and regulations, provided however, that Licensee shall not be required by Agency to obtain any further licenses, encroachment permits or other forms of permission for such work. Any work performed by Licensee shall not unnecessarily interfere with the operation or use of any Agency-owned property by any Agency departments. Licensee or its contractor may access the Communication Equipment from any Poles upon written notice to Agency at least five (5) business days in advance of the work. Licensee shall complete such work within a reasonable time limit, subject to weather delays, as may be specified in each application and written approval. Upon completion of the work, the Licensee, and its, employees, contractors, and agents shall leave the area in a clean/orderly condition, including removal of all debris, litter and other materials, provided however, that nothing in this Right of Entry shall obligate Licensee remove any Communication Equipment installed on Agency's Poles.
2. This Right of Entry shall be irrevocable and shall continue in full force and effect during its entire term. The term shall commence on the date of full execution of this Right of Entry and continue until one hundred and eighty (180) days after the last date on which MetroFi's rights to attach to the Poles under the Pole Contact Agreement terminate or expire, which, absent an earlier termination under the terms thereof, shall be the Expiration Date specified in the Pole Contact Agreement. Agency agrees to provide Licensee within written notice within thirty (30) days of termination of the Pole Contact Agreement.
3. This Right of Entry shall not in anyway whatsoever create or vest any ownership interest, tenancy or other interest in the Poles and Licensee's rights thereto shall remain a license.
4. Licensee shall not assign this Right of Entry, or any portion of it, without the prior written consent of Agency, which shall not be unreasonably withheld or delayed.
5. Licensee shall indemnify, defend and hold harmless Agency, its officers, employees, and agents from all liability for damages proximately resulting from any operations under its franchise with Agency.

IN WITNESS WHEREOF, the parties hereto, being duly authorized, have executed this Right of Entry Agreement on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

[CITY/COUNTY/AGENCY]

PACIFIC GAS & ELECTRIC COMPANY

Name \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Signature \_\_\_\_\_

Signature \_\_\_\_\_

**POLE CONTACT AND FRANCHISE AGREEMENT  
BY AND BETWEEN THE  
CITY OF MILPITAS, CALIFORNIA  
AND  
METROFI, INC.**

**EXHIBIT B  
INSURANCE COVERAGE REQUIREMENTS**

Company shall procure and maintain for the duration of the franchise agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by the Company, its agents, representatives, or employees.

**Minimum Scope and Limits of Insurance**

Company shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. ISO Occurrence Form CG 0001 is required.
2. Automobile Liability: \$1,000,000 per accident for bodily injury and property damage. ISO Form CA 0001 is required if Company owns any vehicles. Otherwise, non-owned and hired automobile liability coverage is required.
3. Workers' Compensation and Employer's Liability: \$1,000,000 per accident for bodily injury or disease or the statutory requirement whichever is greater.

**Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared and approved by the City of Milpitas. The Company shall guarantee payment of any losses and related investigations, claims administration and defense expenses within the deductible or self-insured retention.

**Other Insurance Provisions**

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The City of Milpitas, its officials, employees, agents and volunteers are to be covered as additional insureds with respect to liability arising out of activities performed by or on behalf of the Company; products and completed operations of

the Company; premises owned, occupied or used by the Company; or automobiles owned, if any, leased, hired or borrowed by the Company. The coverage shall contain no special limitations on the scope of protection afforded to the City of Milpitas, its officers, employees, agents or volunteers, except as follows. Coverage shall not extend to any indemnity coverage for the active negligence of the additional insured in any case where an agreement to indemnify the additional insured would be invalid under subdivision (b) of section 2872 of the Civil Code of California.

2. For any claims related to this project, the Company's insurance shall be primary. Any insurance or self-insurance maintained by the City of Milpitas, its officers, officials, employees, agents and volunteers shall be excess of the Company's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Milpitas, its officers, officials, employees, agents or volunteers.
4. The Company's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be cancelled by either party except after thirty (30) days' prior written notice has been given to the City of Milpitas.

#### Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the City of Milpitas.

#### Verification of Coverage

Company shall furnish the City of Milpitas with original Certificates of Insurance effecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City of Milpitas prior to commencement of work. Company shall furnish to City upon request copies of all insurance policies under this Agreement, with evidence of City included as an additional insured.

**POLE CONTACT AND FRANCHISE AGREEMENT  
BY AND BETWEEN THE  
CITY OF MILPITAS, CALIFORNIA  
AND  
METROFI, INC.**

**EXHIBIT C  
PERSONNEL CONTACT FORM**

**For City of Milpitas:**

Primary Contact and during normal business hours for General Administration:

Name:  
Title:  
Address:  
Telephone:  
Facsimile:  
Email:

Non-Emergency Service Requests during normal business hours (6:30 a.m. – 4:30 p.m., M-F) and after-hours:

Name:  
Telephone:  
Facsimile:  
Email: \_\_\_\_\_ with copies to:

Emergency Service Requests (24 hours):

**For MetroFi, Inc.**

Primary Contact:

Name: Lee Hambro  
Title: Sr. Manager of Operations  
Address: 516 Clyde Ave, Mountain View, CA 94043  
Telephone: (650) 218-4647  
Facsimile: (650) 810-8001  
Email: lhambro@metrofi.com

Secondary Contact:

Name: Mike Maley  
Title: Operations Specialist  
Address: 516 Clyde Ave, Mountain View, CA 94043  
Telephone: (650) 867-4154  
Facsimile: (650) 810-8001  
Email: mmaley@metrofi.com